



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 15, 1998

Ms. Julie B. Ross
Haynes & Boone, L.L.P.
201 Main Street, Suite 2200
Fort Worth, Texas 76102-3126

OR98-3124

Dear Ms. Ross:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 120569 (your City Request No. 4396).

The City of Coppell (the "city"), which you represent, received a request for documents relating to the petition filed by Ms. Lisa Andrus and the internal affairs investigation of Ms. Andrus "which Andrus authored, saw, had access to, or knowledge of" The only documents at issue here are "[t]he 'back-dated' document" and "[t]he May 11, 1998 'written memorandum'" referred to in Ms. Andrus's petition. You contend that these documents are excepted from disclosure pursuant to sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. You do not refer us to, and we are not aware of, any law that would make the documents at issue confidential. Therefore, the documents are not excepted from disclosure pursuant to section 552.101.

Section 552.103(a) of the Government Code, the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.¹ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You have shown that the city reasonably anticipates litigation involving Ms. Andrus, and that the documents at issue are related to the reasonably anticipated litigation. However, information that has either been obtained from or provided to the opposing party in anticipated litigation, through discovery or otherwise, is not excepted from disclosure under section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). The city obtained both of the documents at issue from the opposing party in the anticipated litigation. Therefore, we conclude that the city may not withhold the documents from disclosure under section 552.103(a). Because the documents are not excepted from disclosure under either section 552.101 or section 552.103(a), the city must release the documents to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982), and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

KEH/mjc

Ref: ID# 120569

Enclosures: Submitted documents

cc: Mr. R. G. Harrell
548 W. Oak Grove
Coppell, Texas 75019
(w/o enclosures)